PUBLIC PROSECUTOR

v.

LOO KECK LEONG

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 58-12-88]
28 JULY 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Presumption of possession - Control and custody of bags containing the drugs - Whether knowledge of nature of contents of bag - Balance of probabilities - Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1).*

STATUTORY INTERPRETATION: *Trafficking in cannabis - Statutory definition of 'cannabis' - Whether resin extracted from the plant material - Dequinois Levine test - Thin Layer Chromotography test - Dangerous Drugs Act 1952, s. 2.*

The accused was charged with the offence of trafficking in dangerous drugs under s. 39B(1) of the Dangerous Drug Act 1952 (The Act). The drugs were found in a bag carried on the accused's shoulder and another plastic bag carried by the accused in his hand.

At the trial, the chemist testified that he had analysed all the plant material and found the plant material to be cannabis. Defence Counsel however argued that there was no evidence that the dried plant material was from the genus cannabis and he also argued that it had not been shown that 'cannabis resin' had not been "extracted" from the plant material, as was defined under s. 2 of the Act.

Held:

[1] Under the present definition of 'cannabis' in the Act, cannabis means the genus cannabis from which the resin must not have been extracted. It seems clear that if the plant material of the genus cannabis contains no cannabis resin there can be no offence in connection with such material - this can only arise if the cannabis resin has been completely withdrawn from the plant material.

[2] From the totality of the tests carried out by the chemist on the microscope examination of the plant material, that is, the Dequinois Levine test and the Thin Layer Chromotography test, the plant material was of the genus cannabis. However, he was not able to say if the plant material had undergone any process of extraction of the cannabis resin.

[3] The presence of the cannabis resin was not merely as a trace residue but it showed the resin had not been extracted from the plant material in the sense of it not having been completely withdrawn from the plant material. Therefore the plant material that was seized was 'cannabis' within the meaning of "cannabis" as defined in s. 2 of the Act. The presence of the cannabis resin in the plant material was sufficient to show that the exhibit was cannabis.

[4] The story of the accused and the defence witness, was full of holes, contradictions and improbabilities. On a balance of probabilities, the accused had not rebutted the presumption that he knew that the contents of the bags he was in possession of were cannabis and on a balance of probabilities he had not rebutted the presumption that he was trafficking in the cannabis.

[Accused found guilty.]

Case referred to:
PP v. Puteh Nordin & Anor. [1983] CLJ (Rep) 792 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(vi), 39B(1), B(2)

For the public prosecutor - Mohd. Zabidin b. Mohd. Diah, DPP
For the accused - Jeffrey Fernandez; M/s. Fernandez & Co.

JUDGMENT

KC Vohrah J:

The accused is charged that he on 16 November 1987 in the area of the bus station, Jalan Petri, Sungei Petani at about 3 p.m. trafficked in 2897.6 grammes of cannabis, an offence under s. 39B(1) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

The evidence of Inspector Jamaludin (PW3) was that on the date and time mentioned in the charge, at the Jalan Petri bus station in Sungei Petani, he observed a male Chinese walking in the direction where he and Detective Police Constable Saidina were stationed. The man had a bag hanging from his left shoulder and he held a plastic bag in his right hand. The inspector and the constable then walked towards this man and the inspector introduced himself as a police officer. The man appeared shocked and tried to run away but Constable Saidin caught him in an embrace from the back and, with the assistance of two other police personnel, arrested the man, the accused.

The bag (P7) hanging from the shoulder of the accused contained a plastic bag holding dried plant material (P8) and a metal container containing shoe polish (P9). The plastic bag (P6) which the accused held in his right hand contained a paper bag (P10) in which were 2 parcels of dried plant material (P12 and P13). The chemist (PW2) testified that he analysed all the plant material and found the plant material to be altogether 2897.6 grammes of cannabis.

The accused did not dispute the prosecution facts relating to his arrest save as regards the evidence of Inspector Jamaludin that the accused appeared shocked. Inspector Jamaludin had used the Malay word "terkejut" and under cross-examination, as I understood him, he agreed that the accused was "surprised". He also said that he and Constable Saidina were in plain clothes when they arrested the accused.

The prosecution had closed its case. And I am satisfied on a *prima facie* basis that the accused was in control and custody of the bags containing the plant material which had been seized from him and that the plant material was the same plant material that the investigating officer of the case ASP Ahmad Razali (PW4) had handed to the chemist PW2 and which the chemist had analysed and which was handed back to ASP Ahmad Razali and produced in Court. The question is whether the plant material is "cannabis" as statutorily defined under s. 2 of the Act.

The defence Counsel disputes the chemist's opinion that the dried material is "cannabis". The chemist had said that he had examined the plant material and found the material to be 2897.6 grammes of "cannabis" and that by "cannabis" he meant it was as defined under the Act.

Defence Counsel argued that there was no evidence that the plant material was from the genus cannabis and he also argued that it had not been shown that "cannabis resin" had not been "extracted" from the plant material, that is, that the resin had been completely extracted from the plant material.

The Dangerous Drugs Act 1952 (Revised 1980) was previously known as the Dangerous Drugs Ordinance 1952 and at that time the expression "cannabis" was not statutorily defined. Cannabis was known by its then other name, "Indian hemp" which was statutorily defined. In 1972 by Act A 112 the expression "Indian hemp" was deleted and the expression "cannabis" was inserted but the definition itself remained substantially similar and reads thus:

> "cannabis" (except where used in the expression 'cannabis resin') means the flowering or fruiting tops of any plant of the genus cannabis from which the resin has not been extracted, by whatever name they may be designated;

Then in 1980 by Act A 491 that definition was substituted for by another definition and interestingly enough the requirement that the resin be not extracted from the plant material was dropped. The definition reads thus:

> "cannabis" (except in the expression "cannabis resin") means any plant of the genus cannabis or any part of any such plant (by whatever name designated) but does not include cannabis resin or any of the following products after separation from the rest of the plant, namely:
>
> (a) mature stalk of any such plant,
>
> (b) fibre produced from mature stalk of any such plant; and
>
> (c) seed of any such plant;

This definition was examined in *PP v. Puteh Nordin & Anor*. [1983] CLJ (Rep) 792 and had a short life span in the Act. It was replaced by the present definition by Act A 553 on15 April 1983. And with the present definition the requirement that the resin must not have been extracted from the plant material has been revived.

The present definition reads:

> "Cannabis" means any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated;

This requirement that the resin has not been extracted from the plant under the present definition has to be considered then as significant for otherwise why revive the requirement? Under the 1980 definition even if the plant material was merely from the genus cannabis and the plant material did not contain any cannabis resin it fell within the definition of "cannabis".

I think it can be said that Parliament was of the view that it would not be reasonable to charge persons with offences relating to cannabis plant material where cannabis resin is absent. With the new definition substituted for the 1980 definition it seems clear that if the plant material of the genus cannabis contains no cannabis resin there can be no offence in connection with such material. And that can only arise if the cannabis resin has been completely withdrawn from the plant material.

I now come back to defence Counsel's attack on the evidence of the chemist. His contention was that the plant material that was seized from the accused is not "cannabis" as defined under s. 2 of the Act; there was no evidence that the plant material was from the genus cannabis and it had not been shown that the cannabis resin had not been "extracted" from the plant material.

I have examined the evidence of the chemist. I am satisfied with his opinion that from the totality of the tests he carried out on the plant material, that is, a microscopic examination of the plant material, the Dequinois Levine test and the Thin Layer Chromotography test, the

plant material was of the genus cannabis. On the matter of the cannabis resin the chemist was not able to tell if the plant material had undergone any process, either through threshing or through chemical solvents, meant to extract cannabis resin from the plant material. In answer to my question he said he could not tell if any solvent had been used to dissolve out the cannabis resin nor could he tell how much of resin was present in the plant. As regards one of the tests he conducted, the Thin Layer Chromotography test, he said that that was a sensitive test. He, however, did not do any quantitative test on the cannabis resin present and while he agreed with defence Counsel that if one extracts resin from the plant material there might still remain an insignificant trace of the resin on the plant, his evidence was to the effect, on the other hand, that for the Dequinois Levine test which he conducted on the seized plant material "it needs quite a bit of the presence of cannabis resin to give a positive reaction" and he also added, "... if you have recovered all the cannabis resin the colour test would be negative."

In other words the presence of the cannabis resin was not merely as a trace residue; it showed the resin had not been extracted from the plant material in the sense of it not having been completely withdrawn from the plant material. Therefore the plant material that was seized is "cannabis" within the meaning of "cannabis" as defined in s. 2 of the Act. I note that in the case of *Shamsuddin bin Hassan & Anor. v. PP* Ipoh High Court Criminal Trial No. 58-6-86 my learned brother Malek J accepted the evidence of the chemist that the plant material he examined was cannabis; the chemist stated in that case that there was cannabis resin present in the plant exhibit that he examined although he could not tell whether or not the resin had been extracted. With respect I agree with his Lordship's view that the presence of the cannabis resin (in the plant material) was sufficient to show that the exhibit was ganja (cannabis).

In my view the evidence of the chemist in the present case was clear that the plant material is cannabis.

As was stated earlier on a *prima facie* basis the primary facts showed the evidence that the accused was in control and custody of the bags containing the plant material, that is, the drug cannabis. That being so he is presumed under s. 37(d) to have been in possession of the drug cannabis until the contrary is proved and until the contrary is proved, he is presumed to have known the nature of the drug.

The evidence was that the plant material weighed 2897.6 grammes and this is well in excess of the presumptive amount of 200 grammes under s. 37(da)(vi) it being presumed that any person found in possession of 200 grammes or more in weight of cannabis was trafficking in that drug.

In the circumstances the accused is called upon to make his defence on the charge.

Defence

The accused elected to give his evidence on oath and called one witness Ding Chee Ming. The accused admitted that the police arrested him with the two bags (P6 & P7) but he denied knowing that they contained cannabis. He thought they contained herbs which he had collected from a Malay man at the behest of one "Ting Chee Ming" (who identified himself as Ding Chee Ming).

The accused said that he took a trip to Sungei Petani from Prai where he worked as a clerk for his father. He drove in a company car and met with Ding at Sungei Petani at Ding's shop at about 10 in the morning. He had come to see Ding as Ding had just opened a toto

shop. They chatted for a while and then they went for their lunch at a coffee shop near the bus station at about 1 p.m. and they spent one hour there. He drove to the place and parked the car near the eating shop. He pointed out the shop in the sketch plan (P15) as being near the corner area of the lower row of shophouses marked "Kedai" in the sketch plan. In other words the eating shop was along Jalan Petri itself. After lunch they again chatted and then Ding requested him to get some herbs for his mother who was sick.

He said that he then followed Ding to the bus station in front of the PKNK building block (shown on the right hand side of sketch plan, P15) and Ding pointed out a male Malay to him. He said that the man was about 30 feet away from them and Ding wanted him to get the herbs from this Malay man. He said he went inside a shop (and he pointed to the same block marked "PKNK" on the right hand side of the sketch plan) and collected the herbs from the man. He said he did not know that the bags contained cannabis.

He said that Ding did not follow him to the shop where the Malay man was and that he did not think it strange for Ding not to collect the things from the man when he was nearby. He said that after he had collected the herbs Ding then told him that he was going to purchase some other things and he saw Ding walk in the direction of the "PKNK" building block shown at the top of the sketch plan. He pointed that out in the sketch plan. He said after that while walking to the place where he had parked the car he saw 2 Malay males in front of him come and catch hold of him. He said he was surprised and he denied that he tried to escape. He stated that there was a Malay man at the back of him and that man told him that he was a policeman. He agreed that he was arrested at the point 'X' in the sketch plan where Inspector Jamaludin had stated he was arrested.

The accused stated that he was then brought to a room in the police station Sungei Petani where there were 2 policemen and he was told to make a statement. He told them what had taken place. They did not believe him and they slapped him in the ear area. I consider this last aspect of the evidence as irrelevant to his defence and the case.

I pause here to state that in his defence the accused did not contradict the case for the prosecution that as he walked from the direction of the PKNK block (shown on the right side of the sketch plan) he had the two bags, P7 and P6, with him and that he was arrested by the police. Inspector Jamaluddin had stated that he had introduced himself as a police officer and that the accused appeared shocked and tried to run away. Inspector Jamaluddin was however not challenged as regards his testimony that after he introduced himself the accused tried to run away. He was asked if, and he agreed that, the accused appeared surprised. In my view the accused did try to run away; no reasonable doubt has been created in my mind that that Inspector Jamaludin introduced himself and the accused tried to run away.

The more important questions are whether the accused, on a balance of probabilities, knew the nature of the contents of the bags as being cannabis and whether, on a balance of probabilities, he was trafficking in the cannabis?

The totality of the evidence adduced in the case including the evidence of DW2 has to be examined.

DW2, Ding Chee Ming, stated that he operated a sports toto shop in Sungei Petani and that on 16 November 1987 (the day the accused was arrested) the accused visited him. They chit chatted and then they went for lunch at a shop near the bus station and after lunch he requested the accused to get herbs which he wanted for his mother's sickness from a Malay man at a shop near the bus station. He stated that he told the accused he "was lazy to walk

there" and requested him to take the herbs. He said that he told him he would wait for him at the place where he parked the car, which, according to him, was along Jalan Petri. As he was walking to the car he saw a few Malay men surrounding the accused and he felt something was wrong and he left the place.

Under cross-examination he was forced to reply on specific matters. His evidence was that after the accused and he had chatted they went for lunch, using the accused's car, at a coffee shop near the bus station. The car was parked at a corner near the coffee shop where they had lunch. He stated that the coffee shop was not shown in the sketch plan. He pointed to the left side of Jalan Petri (shown on the left of the sketch plan P15). What he showed went beyond the left side of the sketch plan and beyond the junction shown at the bottom of the sketch plan. And what he said contradicted the accused's evidence relating to this eating shop which showed that it was along Jalan Petri itself. It seems strange that the two who spent well over an hour at the shop could not agree as to where the shop was.

Ding also stated that when they had just come out of this coffee shop he told the accused to collect the herbs from the Malay man. He said that at that time the man was standing at the supermarket near the bus stop. He agreed that the supermarket was shown as "Supermarket Seri Kota" in the sketch plan (shown at the bottom left corner of the sketch plan). He pointed the position of the Malay man as being on the right side of this supermarket. He agreed that the man was roughly below Box No. 6 shown in the sketch and he said that after coming out from the coffee shop and walking towards the corner of the junction (that is, while still at Jalan Petri, nowhere near the PKNK blocks of building) he pointed the Malay man to the accused. From the sketch it is quite clear that he could not have seen from the junction (on the lower left hand side of the sketch plan) through the supermarket building and the stalls which ran along the longer side of the building (see boxes 9, 8, 7, 6 etc in the sketch) to the area on the opposite side of the supermarket building and behind the line of shops. The photographs P2A and P2C taken by PW1 on the same day of the arrest of the accused show that it is not possible to see what was behind the stalls. Thus the lies of Ding were exposed when he was cross-examined on details and when confronted with the sketch plan and the photographs.

Ding said he knew the Malay man as Ali. He stated that he told the accused to take herbs from the Malay man, Ali. He stated that he did not give money to the accused and he said, "I told him it would cost several dollars." He said he told him to pay first.

And he said as he was walking towards the car he saw the accused being surrounded.

It is clear from what Ding had stated that the accused must have collected the bags from the Malay man at the place pointed out by him by the side of the supermarket behind the stalls (shown as being more to the left of the sketch plan). And it is clear that he did not wait for the accused nor talk to the accused before the accused was arrested. The evidence of the accused was quite, quite contrary. His evidence was that Ding walked with him to the PKNK block (shown as being to the right of the sketch plan) well beyond the supermarket. Then Ding pointed to the Malay man who was inside a shop in the PKNK block. He collected the goods from the area and he came back to see Ding who was still there. He said that Ding then told he was going to purchase some other things and walked in the direction of the other PKNK building block (shown at the top of the sketch plan) while he himself walked across (from right to the left of the sketch plan) before he was arrested. It is manifestly clear that both the accused and Ding were telling lies. The discrepancies in their stories are not minor but material and glaring.

As regards that aspect of the evidence of Ding that he told the accused that the herbs cost several dollars only and that he requested the accused to pay first, the accused himself did not mention about the cost factor. Cannabis - 2897.6 grammes of cannabis - cannot be bought for merely "several dollars". And it is hardly credible that the Malay man referred to by Ding as Ali would have parted with the cannabis for a mere "several dollars" or have given by mistake the "cannabis" instead of the "herbs" to the accused. Assuming that this man Ali was selling cannabis (and whether or not Ding knew about it) it is highly improbable that Ali would peddle cannabis to any stranger who approached him for from the evidence of both the accused and Ding the accused did not know the man called Ali.

In the final analysis the story put up by the accused and Ding is full of holes, contradictions and improbabilities. Their story of the events at the eating shop, the bus station and the accused's encounter with Ali at the behest of Ding cannot hold water. It will be remembered as I said that the accused tried to run away after Inspector Jamaluddin identified himself. Why try to run away if he was innocent? On a balance of probabilities the accused has not rebutted the presumption that he knew that the contents of the bags he was in possession of were cannabis and on a balance of probabilities he has not rebutted the presumption that he was trafficking in the cannabis.

I find him guilty on the charge and I convict him.

Also found at [1991] 3 CLJ 2584